Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: February 20, 1998
CASE NO: 97-INA-096

In the Matter of:

R & S TAX ACCOUNTING
Employer

On Behalf of:

SIRVARD AVETISIAN
Alien

Appearance: A. Gharib
Glendale, CA
For the Employer and Alien

Before: Holmes, Jarvis and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27 (c).

Statement of the Case

On January 8, 1995, R & S Accounting ("employer") filed an application for labor certification to enable Sirvard Avetisian ("alien") to fill the position of Budget Officer at a monthly salary of $4,691 (AF 146). The job duties are described as follows:

> Preparation and presentation of budget for controlling funds to implement programs and objectives of clients in various types of private businesses. Direct compilation of data based on statstical [sic] studies and analyses of past and current years to prepare budgets and to justify funds requested from banks and financial institutions. Obtain supporting documents to submit to financial institutions for requested loans. Review operating budget periodically to analyze trends affecting budget needs such as economic conditions related to each business. Discuss with customers required expenditures, required funds, and policiers [sic] for carrying out directives. Calculate payments if feasible for businesses versus long term debts. Clarify reports and gain support of required funds.

The job requirements include a Bachelor's degree in Finance or Economics and four years of experience in the job offered. The employer also required the officer to work Tuesday through Saturday, with Sundays and Mondays off. Lastly, the employer specified that the incumbent must be fluent in Armenian.

On February 23, 1996, the CO issued a Notice of Findings proposing to deny the labor certification. The CO found that the employer violated §656.21(b)(2) which provides that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. The job opportunity's requirements, unless adequately documented as arising from business necessity, shall not include requirements for a language other than English. The CO noted that the employer required fluency in Armenian. The CO therefore requested that the employer delete the foreign language requirement and retest the labor market, or justify the requirement as arising from business necessity. The CO also questioned whether the job opening was clearly open to U.S. workers. The CO stated that it appeared the employer created the job based on the alien's degree and experience, and added that the duties listed on the

[1] All further references to documents contained in the Appeal File will be noted as "AF."

labor certification application are inconsistent with the practice of a tax accounting firm. For instance, the CO observed that loan application assistance has very little to do with the stated duties of "reviewing, examining, and evaluating the organizational structures, administrative policies, or management systems of organizations" (AF 157). The CO thus requested the employer to demonstrate that a current full-time job opportunity existed. She further directed that the documentation should include a copy of the business license, incorporation documents; business brochures and advertisements, a list of private businesses for which the employer has performed the petitioned job duties, and examples of products and completed services.

In rebuttal, dated March 28, 1996, the employer argued that the language requirement arises out of business necessity because 80 percent of its clientele are Armenian immigrants now living in California. The employer also contended that the offered position is a full-time job opportunity and that other employees were forced to perform the budget management duties up the employer filed for labor certification. Lastly, the employer requested an extension of time in order to respond to the NOF issues in full (AF 153).

The CO issued a second NOF on April 15, 1996 reiterating her prior findings. In addition to the prior findings, the CO also determined that the employer violated §656.21(b)(5) which provides that the job requirements must represent the actual minimum requirements for the position. Specifically, the CO objected to the requirement that applicants possess four years of experience in the job offered. The CO acknowledged that the alien possessed experience as a budget officer, but found that he did not have four years of experience performing the stated duties.

The employer provided a second rebuttal on May 20, 1996 arguing that the alien is qualified for the position as he has more than 16 years of experience working as a Budget Officer for the Ministry of Foreign Affairs in the former Soviet Union (AF 9). In response to the language requirement, the employer enclosed advertisements in the Armenian language, a list of Armenian-speaking clients, and investment records from several private individuals and businesses.

The CO issued the Final Determination on June 28, 1996 denying the labor certification. The CO accepted the employer's argument concerning minimum job requirements, but found that the employer failed to establish that a full-time job opening existed and that the Armenian language requirement arose out of business necessity.

On July 9, 1996, the employer requested review of Denial of Labor Certification pursuant to § 656.26 (b) (1) (AF 1).

Discussion

The issues presented by this appeal are whether the Armenian language requirement is unduly restrictive under § 656.21 (b) (2), and whether the employer established that a full-time job opening existed which was clearly open to U.S. workers..

Section 656.21 (b) (2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21 (b) (2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for a job in the United States. *Ivy Cheng*, 93-INA-106 (June 28, 1994). *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*).

Section 656.21 (b) (2) (i) (c) explicitly provides that a job opportunity shall not include a requirement for a language other than English unless that requirement is adequately documented as arising from business necessity. The business necessity standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc*) is applicable to foreign language requirements. As the *Information Industries* standard has developed in relation to foreign language requirements, the first prong generally examines whether the business includes clients, co-workers or contractors who speak a foreign language, and what percentage of the business involves the foreign language. The second prong focuses on whether the use of the foreign language is essential for the reasonable performance of the job duties.

In *Splashware Company*, 90-INA-38 (Nov. 26, 1990), the Board held that in order to meet its burden of proof, an employer must submit evidence to support its assertion that fluency in a language other than English is essential. Business necessity is not established where the documentation does not support the employer's assertions that a high level of communication is required in the position offered. In this case, the employer argued that the language requirement arises out of business necessity because 80 percent of its clientele is Armenian-speaking. In support of this claim, the employer submitted a list of clients, a Fannie Mae loan application translated into Armenian, a copy of one of its advertisements written in Armenian, and investment records from private individuals and businesses. We find that this evidence is unpersuasive in establishing that a major portion of the employer's business transactions are conducted in Armenian. Additionally, according to the evidence of record, the great majority of the employer's clients are located in California which, at the very least, suggests that they are able to communicate in English. Because the employer failed to demonstrate that the language requirement arises out of business necessity, certification cannot be granted and further examination of the record is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.